



# *Alabama*

## *Department of Revenue*

### *Collection Services Division*

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#### **810-12-1-.01. General Rule - 100% Penalty for Willful Failure to Collect and Pay Over Tax or Willful Attempt to Evade or Defeat Tax.**

(1) Any person required to collect, truthfully account for, and/or pay over any tax imposed by §40-17-2 (Motor Fuels Excise Tax), §40-17-220 (Gasoline, Motor Fuels and Lubricating Oil Excise Tax), §40-18-71 (Income Tax Withholding), §40-21-82 (Utility Gross Receipts Tax), §40-23-2 (State Sales Tax), §40-23-61 (State Use Tax), §40-26-1 (State Lodgings Tax), Code of Alabama 1975, as amended, or any other local sales, use, or gross receipts taxes collected by the Alabama Department of Revenue who willfully fails to collect such tax, or truthfully account for, and/or pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall in addition to other penalties, be liable for a penalty in an amount not to exceed the total amount (100%) of the tax evaded, or not collected, or not accounted for and paid over. These designated taxes may be referred to as trust-fund taxes since they are collected in a fiduciary capacity on behalf of the Department of Revenue.

(2) The term "person" means an officer of a corporation or a member of a partnership who by virtue of such position held, is charged with a duty to perform the act of collecting, truthfully accounting for, and/or paying over any trust fund tax to which this penalty relates.

(3) The penalty imposed by this section is not assessed against the corporation or partnership which has the primary liability for the taxes required to be collected, accounted for, and/or paid over to the Department of Revenue. The 100% penalty is assessed against any corporate officer(s) or member(s) of a partnership who is under a duty on behalf of the corporation or partnership to collect, account for, and/or pay over the tax to the State of Alabama. (Adopted through APA effective August 12, 1986) (§40-29-72, §40-29-73)

#### **810-12-1-.02. Assessment Procedures - 100% PENALTY.**

(1)

(a) The procedures for imposing a 100% penalty assessment against a responsible corporate officer of a corporation or member of a partnership that has failed to pay over designated trust-fund taxes as set forth in Section 40-29-73, shall be the same as the usual provisions for assessment of taxes as provided in the Revenue Code, the Alabama Administrative Procedure Act, and the regulations promulgated by the Department of Revenue thereunder.

(b) If the Department determines that a 100% penalty assessment should be entered against a corporate officer (s) or a partner, the Department will so inform the person of the amount due and request payment of same by issuance of a formal Notice and Demand. This notice will require payment of the 100% penalty within 30 days. If the amount due is not paid within the 30 day period, the Department will enter a preliminary assessment and notify the corporate officer or partner of such assessment. The preliminary assessment will inform the person of the amount due and a date when a conference may be held with the Assessment Officer for the purpose of informally settling or resolving the assessment. If the person chooses to attend this conference, but does not agree with the Department's position, he may request a formal contested hearing with the Administrative Law Judge. If the person does not appear at the

informal conference, he nevertheless may request a formal hearing with the Administrative Law Judge. In either case, in order to exercise his right to a formal contested hearing, the person must file notice of his request in writing with the Administrative Law Division within 15 days from the date of the conference as designated in the preliminary assessment notice, or 15 days from the date of determination of liability by the Department. If the Administrative Law Division conducts a contested case hearing in the matter, a final assessment will be entered in accordance with the decision and order of the Administrative Law Judge and an appeal therefrom may be made to an appropriate Circuit Court under §40-2-22, Code of Alabama 1975. If said person does not appeal to the Administrative Law Division within the designated time permitted, a final assessment of the penalty will be entered by the Department and an appeal therefrom may be made to an appropriate Circuit Court under §40-2-22, Code of Alabama 1975.

(2)

(a) Alternatively, if within 30 days after the Notice and Demand is made, said person pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his/her liability for such penalty and files a claim for refund, and furnishes a bond in an amount 1 1/2 times the amount of the excess penalty assessed over the amount of the penalty paid, he/she must begin a proceeding in the appropriate Circuit Court for a determination of his/her liability for the 100% penalty within 30 days of the date on which his/her claim for refund is denied. All assessment and collection procedures for the penalty are stayed pending final resolution of the suit, or until 30 days have expired during which time the person failed to begin the appropriate court proceedings. If the person fails to begin a proceeding in an appropriate Circuit Court within 30 days of the denial of the claim for refund of the penalty paid, such person will be deemed to have made such payment voluntarily and will waive any further right to recover the amount so paid.

(b) For income tax withholding, the definition of the "minimum amount" of the penalty required to be paid under (a) above is that amount not less than the total income tax withheld from one employee of the corporation or partnership which was not paid over for one reporting period. For any tax other than income tax withholding, the minimum amount of the penalty required to be paid is that amount not less than the total tax due for one reporting period.

(c) The bond required shall be a commercial bond from a bonding company qualified to do business in the State of Alabama.

(3) No process in court and no levy or other collection procedure for collection of the 100% penalty will be begun until after entry of a final assessment, although liens may be filed at any time. (Adopted through APA August 12, 1986) (§40-29-72(a), §40-29-73(b))

#### **810-12-1-.03. Waiver and Agreement - 100% PENALTY.**

(1) A person potentially responsible for trust-fund taxes due the Department of Revenue may execute a waiver of the limitation period for the assessment of a 100% penalty either before or after an assessment of the trust-fund taxes against the corporation or partnership has been entered. Such waiver does not mean that the person concedes liability for the penalty, but allows the Department sufficient time in which to make a thorough determination of responsibility.

(2) A person may concede liability for the trust fund taxes due the Department of Revenue from a corporation or partnership and execute an agreement to the assessment and collection of the 100% penalty either before or after an assessment of the taxes against the corporation or partnership has been entered. Such agreement shall constitute a final assessment of the 100% penalty and may support the issuance of process such as a levy and execution, or any other collection procedure, just as any other final assessment of a tax. The final assessment of the 100% penalty as agreed by such person constitutes a judgment equivalent to that of a Circuit Court of Alabama. (Adopted through APA August 12, 1986)

#### **810-12-1-.04. Jeopardy Assessment - 100% PENALTY.**

If the Department of Revenue determines that collection of the 100% penalty is in jeopardy, a final jeopardy assessment of the 100% penalty may be entered simultaneously with the Notice and Demand of the penalty against such person. Collection procedures, including a levy and execution, may be initiated immediately based upon the final jeopardy assessment unless and until the person assessed shall file an appeal therefrom in accordance with Section 40-2-22, Code of Alabama

1975. (Adopted through APA effective August 12, 1986) (§40-29-73(b)(5))

**810-12-1-.05. Sale of Seized Property.**

(1) The Commissioner or his delegate shall, as soon as practical after the seizure of any property, give notice of sale in writing to the owner, or in the case of personal property, the possessor thereof, by personal service, or such notice shall be left at his usual place of abode or business. If the owner cannot be readily located or has no dwelling or place of business within the State of Alabama, the notice may be mailed to his last known address. Such notice shall contain, in the case of real property, a description with reasonable certainty of the property seized. The Commissioner or his delegate shall also cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, he shall post notice at the Post Office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and shall include both a legal description and a readily understandable layman's description, and the time, place, manner, and other conditions of sale thereof.

(2) Each public notice shall clearly describe the following:

(a) Time and place of sale. - All sales shall be held within the county in which the property is seized, except that where property is owned in two or more counties, sales of all the property may be held in either county.

(b) Minimum price. - Before the sale, the Commissioner or his delegate may determine a minimum price for which the property shall be sold, and if such minimum price is determined, and if no person offers the amount of the minimum price, the property shall be declared to be purchased at such price for the State of Alabama; otherwise the property shall be declared to be sold to the highest bidder.

(c) Type of sale. - The notice of sale shall state whether the property is being sold by public auction or by public sale under sealed bids.

(3) In the case of the seizure of several items of property, the Commissioner or his delegate may determine whether such items shall be offered separately, in groups, or in the aggregate; and whether such property shall be offered both separately (or in groups) and in the aggregate, and sold under whichever method produces the highest aggregate amount.

(4) The Commissioner or his delegate shall determine, and the notice of sale shall state, whether payment in full shall be required at the time of acceptance of a bid, or whether a part of such payment may be deferred for such period (not to exceed one month) as may be determined to be appropriate.

(5) The Commissioner or his delegate may adjourn the sale from time to time, but in no case shall such adjournment be for a period to exceed one month. The Commissioner or his delegate must announce at the time and place of the scheduled sale his decision to adjourn the sale, and the time and place at which the sale will be held. In case of an adjournment it will not be necessary to advertise the sale.

(6) Payment of amount bid. - If payment in full is required at the time of acceptance of a bid, and if not then and there paid, the Commissioner or his delegate shall forthwith proceed to again sell the property, unless the conditions of the sale, as published, permit part of the payment to be deferred. If such deferred payment is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof if it has not been paid, together with interest at the rate applicable to liabilities due the Department of Revenue from the date of the sale; or in the discretion of the Commissioner or his delegate, the sale may be declared to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold. In the event of such re-advertisement and sale, any new purchaser shall receive such property or rights to property free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by such defaulting purchaser shall be forfeited.

(7) Sale of perishable goods. - If the Commissioner or his delegate determines that any property seized is liable to perish or become greatly reduced in price or value by keeping, or that such property cannot be kept without great expense, he shall estimate the market value of such property and;

(a) Return to owner. - If the owner of the property can be readily found, the Commissioner or his delegate shall give him notice of such determination of the appraised value of the property. The property shall be returned to the owner if, within such time as may be specified in the notice, the owner:

1. Pays to the Commissioner or his delegate an amount equal to the estimated value; or

2. Gives bond in such form, with such sureties, and in such amount as the Commissioner or his delegate shall prescribe, to pay the appraised amount at such time as the Commissioner or his delegate determines to be appropriate in the circumstances.

(b) Immediate sale. - If the owner has not paid such amount or furnished such bond, the Commissioner or his delegate may immediately announce and offer for sale to the general public at auction the property seized.

(8) Upon the expiration of any redemption period, real property acquired by the Department of Revenue as a result of such sale(s) may be advertised and sold by either public auction or public sale under sealed bids.

(9) Consent to sale of property seized in satisfaction of a jeopardy assessment. - If the owner of any property seized by the Department of Revenue to satisfy a jeopardy assessment files an appeal of the jeopardy assessment, the Commissioner or his delegate shall hold the property during the pendency of the appeal unless the owner of the seized property consents to the sale of such property. In the absence of written consent to the sale of such seized property, the Department of Revenue will continue to hold the property and storage charges will continue to accrue. All costs related to the storing and securing of such seized property are the responsibility of the owner of the property seized. If the owner of the property seized consents to the sale of such property, the amount realized from the sale, less costs incurred, will be held in escrow by the Department of Revenue pending a final court decision on the appeal. The owner of any property seized by the Department of Revenue to satisfy a jeopardy assessment may obtain said property by depositing the full amount of the jeopardy assessment together with interest with the Department, to be held in escrow pending a final court decision on the appeal of the assessment. (Adopted through APA effective July 22, 1991) (§40-29-26, Code of Alabama 1975)

#### **810-12-1-.06. Issuance of Writs of Execution.**

(1) **SCOPE.** This regulation applies to the authority of the Department to issue writs of execution to collect a final assessment of tax that the taxpayer has failed to pay through other means.

(2) **PURPOSE.** The purpose of this regulation is to provide guidelines for the issuance of writs of execution by the Department that are consistent with the provisions of Title 6 and Title 40 of the Code of Alabama 1975.

(3) **PROCEDURE.**

(a) The Commissioner or his delegate is authorized, under authority of §40-2-11(16) and §40-29-23, Code of Alabama 1975, to issue writs of execution to collect any final assessment or judgment made or rendered by the Department of Revenue. Executions may be issued to the sheriff of any county in Alabama where the taxpayer may have real or personal property. In order to protect the state's interest, there is no minimal amount required to be due in order to issue a writ of execution. The sheriff shall proceed with the execution in the same manner as if it had been issued out of a circuit court. As provided by §40-1-15, Code of Alabama 1975, the sheriff shall execute writs issued by the Department without requiring any indemnifying bond or other protective obligation.

(b) Identification of Property for Seizure - The Department of Revenue may suggest specific property in which a taxpayer has an ownership interest subject to levy by the sheriff. The sheriff may execute on the property identified by the Department, or he may substitute other property belonging to the taxpayer that he determines to be marketable. The sheriff and/or his deputies will serve notice of levy and sale to the taxpayer in accordance with the procedures provided by Title 6, Code of Alabama 1975. Upon receipt of the writ, the sheriff has responsibility for contacting the taxpayer and serving him with a copy of the Notice of Levy.

(c) Satisfaction Prior to Sale - The sheriff may allow the taxpayer an opportunity to satisfy the final assessment by payment in full. Such opportunity will be determined and handled in accordance with the sheriff's standard operating procedure. If the sheriff is unable to collect the final assessment within the time he allows, he may proceed to sell the property.

(d) Storage of Personal Property Prior to Sale - When the sheriff finds it necessary to levy on personal property, he may remove the property to any secure location within his county for storage purposes until such time as the assessment is paid or the property can be advertised for sale, and sold. The sheriff will exercise ordinary and reasonable care for the seized property in a manner similar to that which the owner might otherwise exercise. Taxpayers are not entitled to any credit for the value of their property that is stolen after levy but prior to sale, unless

such loss or theft is due to negligence by the Department. Any costs incurred by the sheriff for transporting, securing, and storage must be paid by the taxpayer in order to retrieve the property prior to sale. In the event that the Department becomes the successful bidder of the property, the costs of the sale, including, but not limited to advertising, transporting, and storage will be deducted from the successful bid before any credit is given to the taxpayer.

(e) Advertising - Prior to conducting a sale, the sheriff will advertise the property, as required in Title 6, Code of Alabama 1975, in a newspaper of general circulation in the county where the property is located. In the case of personal property, the advertisement will run one time. Advertisements involving levies on real property will run three times prior to the sale. The sale may be postponed if it is determined that the advertisement has not been published in accordance with the provisions of §6-9-87, Code of Alabama 1975, and any such cost will be borne by the taxpayer.

(f) Redemption Prior to Sale - At any time prior to the sheriff's sale, the taxpayer may retrieve his property by paying the amount of the final assessment to the sheriff, along with accrued interest and all costs of the sale. Such costs may include advertising, towing, storage, and other reasonable costs that the sheriff incurs in connection with preparing the property for sale.

(g) Release of Property - The Department may request that the sheriff release the seized property to the taxpayer or a prior lienholder at any time prior to the sale if it is determined that proceeding with the sale is not in the best interest of the Department of Revenue. In such instances, the taxpayer or prior lienholder will be required to pay the sheriff any costs that he has incurred, unless the Department agrees to accept responsibility for such costs because it has erred in the issuance of its writ.

(h) Sheriff to Set Sale - The sheriff will set the day, time, and location when the property is to be sold. The sheriff and/or his deputy may conduct the sale by either public auction or sealed bid sale. The sheriff may employ a professional auctioneer to conduct the sale of seized property, when in his judgment, it would be advantageous to do so. The Department of Revenue is authorized to have a representative bid for the property when doing so is determined to be in the state's interest. However, the failure of the Department to attend the sale will not invalidate its outcome in any way.

(i) Bidding - The sheriff will offer for sale only the right, title, and interest of the taxpayer in and to the property. The property will be sold subject to all prior encumbrances of record. It shall be the duty of the bidders to determine what liens, if any, may be a prior encumbrance on the property. The property is sold as is and without recourse. Generally, any bid entered by the Department will not exceed the taxpayer's equity in the property or the amount due on the execution(s), plus costs, whichever is less.

(j) Payment of Amount Bid - In the event the Department of Revenue is the successful bidder, the sheriff will issue a sheriff's deed or a bill of sale without requiring the Department of Revenue to remit the amount bid for the property. The taxpayer will be given credit on the assessment for the amount of the Department's bid, less any sheriff's costs that were incurred in bringing the property to sale. When the successful bidder is someone other than the Department, payment should be made by the bidder in accordance with the timeframe and in the manner established by the sheriff conducting the sale.

(k) Special Provisions Relating to the Sale of Motor Vehicles - Whenever the sheriff levies on an automobile titled to the taxpayer, the Department may contact any lienholder of record and advise them of the date, time, and location of the sale. Additionally, the Department may, as provided by §32-8-65, Code of Alabama 1975, inquire concerning the lienholder's security agreement and the indebtedness secured by it. When it is determined that a taxpayer has no equity in the vehicle and the lienholder bids the amount of sheriff's costs, the Department may elect not to bid on the property.

1. In the event that the Department is the successful bidder, the vehicle will be resold under authority of §40-29-36, Code of Alabama 1975.

2. Whenever it is determined that the condition of the vehicle is such that it cannot be transported and/or resold without the expenditure of significant state funds, the vehicle may be turned over to the facility where it has been stored in satisfaction of any unpaid storage costs.

3. Whenever any lienholder obtains a turnover order from a court, or presents documentation substantiating that repossession of the vehicle has occurred, the vehicle may be released to the lienholder.

(l) Third Party Claimant - Whenever the sheriff has levied on personal property, and a third party claims ownership of the property that has been seized, the claimant must file an affidavit and bond, as required by §6-6-160, Code of Alabama 1975, with the sheriff prior to the sale. Upon the filing of a claim, the sheriff will return the affidavit and bond to the clerk of the circuit court so that the claim may be set for hearing.

(m) Department to Assist Sheriff - Whenever the Department issues an execution directing the sheriff to seize and sell the tangible personal property of a business, the Department may assist the sheriff in carrying out the execution by providing personnel to inventory, pack, and transport the property to some secure facility where it will remain until such time as the assessment is paid or a sale conducted.

(n) Redemption Period for Personal Property Sold Under Execution - As provided at §40-29-28(d) Code of Alabama 1975, personal property, including motor vehicles, sold under power of execution may not be redeemed by the taxpayer after the sale has occurred. The property continues to be encumbered by any valid pre-existing liens.

(o) Seizures of Real Property - Whenever the Department of Revenue or sheriff identifies real property in which the taxpayer owns an interest, the sheriff will proceed with the levy as required by Title 6, Code of Alabama 1975. When property is jointly owned with other individuals, only the right, title, and interest of the taxpayer will be offered for sale.

(p) Real Property Transferred Subject to Tax Lien - Real property subject to a state tax lien which has been sold or otherwise transferred by the taxpayer, may be levied upon in the hands of the transferee or any subsequent transferee.

(q) Redemption of Real Property - The taxpayer will have one year from the date of the sale to redeem the property from the purchaser. If the purchaser is the Department, the Department may, in its discretion, allow the taxpayer additional time in which to redeem the property. In any event, when redeeming the property from the state, the taxpayer shall be required to pay the amount of the final assessments covered by the writ of execution, plus accrued interest, the sheriff's costs of the sale, and a reasonable deed preparation fee.

(r) Wrongful Levy - If, subsequent to a sheriff's sale, the Commissioner or his delegate determines that the taxpayer was not indebted to the Department in substantially the amount claimed or that property has been wrongfully levied, he may, in accordance with §40-29-34 (b)(3), Code of Alabama 1975, return an amount of money equal to the fair market value of the property levied upon. Such amount should be returned to the owner of the vehicle, unless it is determined that a lienholder of record has a prior interest, in which case payments should be made payable to both the lienholder and owner. For the purposes of this regulation, the fair market value may be determined by using an official National Automobile Dealers Association guide or an appraisal made by a professional qualified to render an opinion, and, in either case, should take into account the condition of the vehicle at the time it was seized.

(Sections 40-2A-7(a)(5), 40-2-11(16), 40-29-23, Title 6, Code of Alabama 1975) (Adopted through APA effective August 3, 2000)

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